IN THE

Supreme Court of the United States

October Term, 1942.

No. 582.

WATERMAN STEAMSHIP CORPORATION,
Petitioner,

v.

DAVID E. JONES,
Respondent.

Petition for Writ of Certiorari and Brief in Support Thereof.

JOSEPH W. HENDERSON,
GEORGE M. BRODHEAD, JR.,
Attorneys for Petitioner.

International, 236 Chestnut St., Philadelphia

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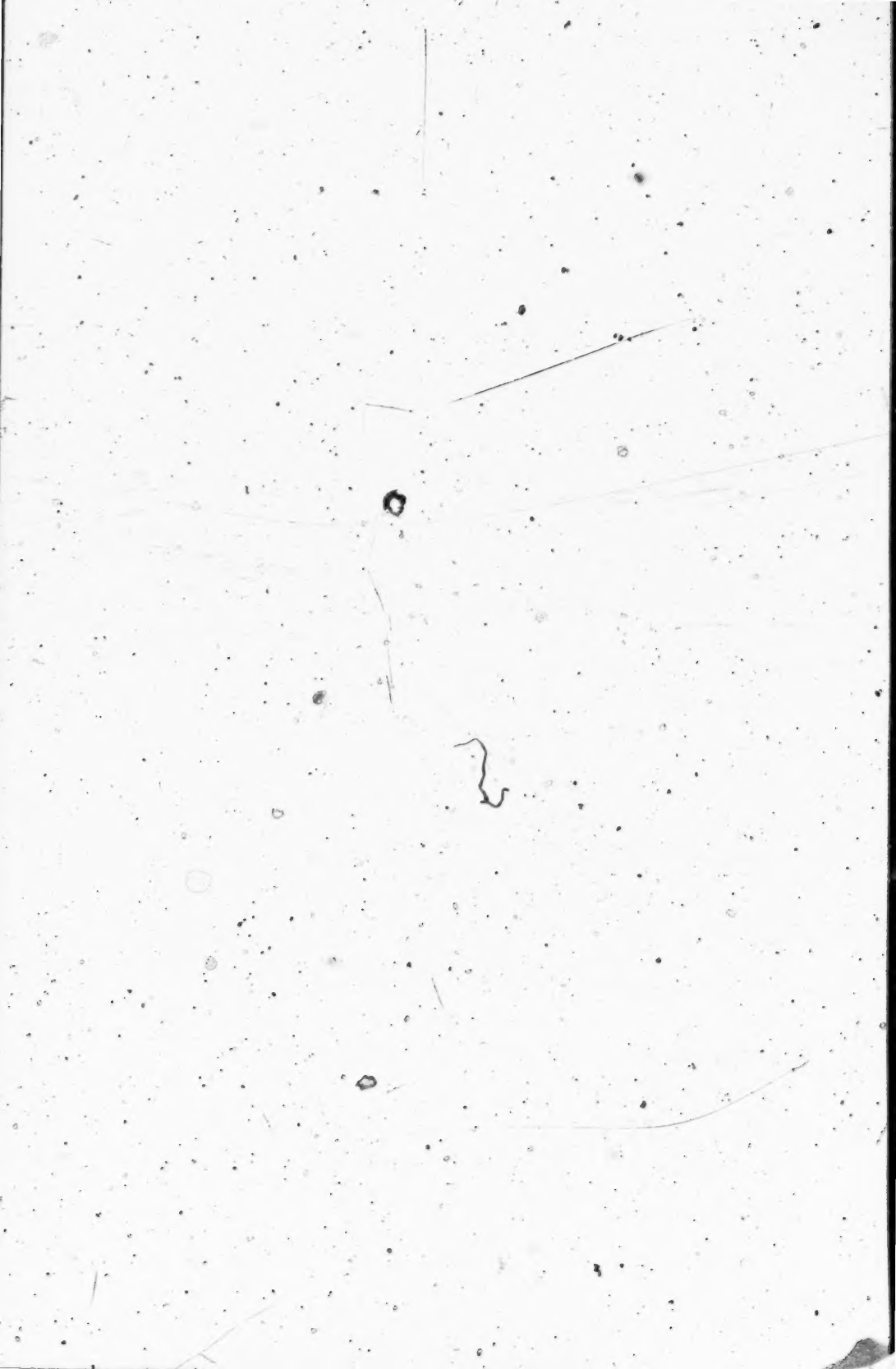

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No.

WATERMAN STEAMSHIP CORPORATION,
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v.

DAVID E. JONES,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Waterman Steamship Corporation, prays that a writ of certiorari be issued to review a final judgment of the United States Circuit Court of Appeals for the Third Circuit entered on September 21, 1942, (R 15) which judgment reversed a final judgment of the District Court of the United States for the Eastern District of Pennsylvania dismissing the above-entitled case for failure to set forth a cause of action upon which relief could be granted (R. 7) and remanded the case for further proceedings (R. 15).

Summary and Statement of Matter Involved.

A civil action was instituted by the respondent in the District Court of the United States for the Eastern District of Pennsylvania to recover damages for maintenance and cure and wages to which the respondent, as a member of the crew of the SS. "Beauregard", claims to be entitled by reason of personal injuries sustained on January 16, 1941. (R. 2, 3.)

The circumstances of the accident, as set forth in respondent's Complaint, are as follows:

> "On or about the 16th day of January, 1941, at or about 5:50 P. M. o'clock and while the vessel was moored to Pier C, Port Richmond, Philadelphia, complainant, in the course of his employment left the vessel on shore leave and was proceeding through the pier towards the street when all the lights on the pier were extinguished and in the ensuing darkness fell into the open ditch at the railroad siding and sustained the injuries which are more specifically hereinafter set forth." (R. 2.)

The petitioner filed a Motion to Dismiss the Complaint for the reason that the respondent's Complaint did not set forth a claim upon which relief could be granted, as the respondent's alleged injury was not sustained while he was in the service of the vessel (R. 4).

After argument sur Motion to Dismiss Complaint, the aforesaid district court filed an opinion on December 5, 1941, granting the petitioner's motion and directing entry of judgment, (R. 4-7) and on December 5, 1941, judgment was entered in favor of the defendant and the case dismissed (R. 7).

An appeal was taken by the respondent to the United States Circuit Court of Appeals for the Third Circuit. After argument before Circuit Judges Jones and Goodrich

and District Judge Leahy, said court filed a decision reversing the judgment of the district court and remanding the case for further proceedings not inconsistent with said opinion. (R. 10-14.) The opinion was written by Circuit Judge Goodrich.

Jurisdiction.

The judgment of the United States Circuit Court of Appeals for the Third Circuit was entered September 21, 1942 (R. 15).

The jurisdiction of this Court to review said proceedings on a writ of certiorari is provided by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, § 1, 43 Stat. 928 (28 U. S. C. A., Section 347 (a)).

Opinions.

An opinion was filed on December 5, 1941, by the Honorable William H. Kirkpatrick. It is not reported.

The opinion of the United States Circuit Court of Appeals, written by Judge Goodrich, was filed on September 21, 1942, and is reported in 130 F. (2d) 797.

Question Presented.

Should a seaman receive maintenance and cure from his vessel and her owners when injured, not on board his vessel or in the service of his ship, but after he had left his ship on his own business and was proceeding through the pier to which his vessel was moored and over which pier neither his vessel nor her owners had any ownership, control or management?

Reasons for Granting Petition.

The petition should be granted because the United States Circuit Court of Appeals for the Third Circuit has

rendered a decision in conflict with a decision of the United States Circuit Court of Appeals for the Second Circuit on the same matter, *Aguilar v. Standard Oil Company of New Jersey*, 130 F. (2d) 154 (C. C. A. 2d, 1942) in which case your Honorable Court denied certiorari on November 16, 1942, and also because the decision of the Court-below is in apparent conflict with prior decisions of the United States Circuit Court of Appeals for the Ninth Circuit, *Todahl v. Sudden & Christensen*, 5 F. (2d) 462 (C. C. A. 9th, 1925); *Meyer v. Dollar Steamship Line*, 49 F. (2d) 1002 (C. C. A. 9th, 1931) and *Angco et al. v. Standard Oil Company of California*, 66 F. (2d) 929 (C. C. A. 9th, 1933).

The decision of the Court-below is likewise in conflict with unappealed decisions of district courts in other circuits, *Collins v. Dollar S. S. Lines, Inc.*, 23 F. Supp. 395 (D. C. S. D. N. Y. 1938); *The President Coolidge*, 23 F. Supp. 575 (D. C. N. D. Wash. 1938); *Smith v. American South African Line*, 37 F. Supp. 262 (D. C. S. D. N. Y. 1941); *Lilly v. United States Lines Co.*, 42 F. Supp. 214 (D. C. S. D. N. Y. 1941) and *Wahlgren v. Standard Oil Company of New Jersey*, 1941 A. M. C. 1788 (D. C. S. D. N. Y.).

The Court-below has decided an important question of federal law which has not been specifically decided, and should be settled, by your Honorable Court. Furthermore, the Court-below has decided an important question of federal law in a way which is probably in conflict with applicable decisions of your Honorable Court concerning a shipowner's liability for maintenance and cure and rights of a seaman with respect theerto. *The Osceola*, 189 U. S. 158 (1903); *Chelentis v. Luckenbach Steamship Company, Incorporated*, 247 U. S. 372 (1918); *Pacific Steamship Company v. Peterson*, 278 U. S. 130 (1928); and *Calmar Steamship Corp. v. Taylor*, 303 U. S. 525 (1938).

The determination of the question presented is of utmost importance to shipowners and their insurance carriers who heretofore were of the firm and settled opinion that a shipowner's liability for maintenance and cure was limited to the time when a seaman was in fact in the service of his ship and did not extend to injuries which the seaman received when away from his ship on shore leave and about his own personal and private business and pleasure. The decision of the Court-below in effect makes the shipowner an insurer of the health and safety of its seamen at all times (except when the injury is caused by the seaman's own wilful misconduct) irrespective of where the seaman may be at the time of the injury and irrespective of whether or not the shipowner has any control over the instrumentalities involved and irrespective of whether or not the shipowner could have prevented the injury even if it had attempted so to do. Such an obligation is beyond that which the law has imposed on a shipowner as an incident of the seaman's employment and is an unjustified extension of the established doctrine of maintenance and cure.

Respectfully submitted,

WATERMAN STEAMSHIP CORPORATION,

By JOSEPH W. HENDERSON,
Of Counsel.

STATE OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA, } *ss.:*

JOSEPH W. HENDERSON, being duly sworn according to law, deposes and says that he is counsel for the petitioner herein and that the facts set forth in the foregoing petition are true and correct to the best of his knowledge, information and belief.

JOSEPH W. HENDERSON.

Sworn to and subscribed before me this 8th day of December, A. D. 1942.

ETHEL S. SMITH,
Notary Public.

(Seal)

My Commission Expires Feb. 3, 1945.

I hereby certify that I have examined the foregoing petition and that in my opinion it is well founded and entitled to the favorable consideration of the Court and that it is not filed for the purpose of delay.

JOSEPH W. HENDERSON,
Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1942.

No.

WATERMAN STEAMSHIP CORPORATION,

Petitioner,

v.

DAVID E. JONES,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

For Opinions Below, Jurisdiction, Statement of the Matter Involved, and Questions Presented see pages 2 and 3 of the Petition.

ARGUMENT.

A Seaman Who Left His Ship on Shore Leave for His Own Business and Was Subsequently Injured While on Property of a Third Party Is Not Entitled to Maintenance and Cure.

The basis of the respondent's cause of action is set forth in Paragraph Five of his Complaint wherein he alleged:

"On or about the 16th day of January, 1941, at or about 5:50 P. M. o'clock and while the vessel was moored to Pier C, Port Richmond, Philadelphia, com-

plainant, in the course of his employment left the vessel on shore leave and was proceeding through the pier toward the street when all the lights on the pier were extinguished and in the ensuing darkness fell into the open ditch at the railroad siding and sustained the injuries which are more specifically hereinafter set forth." (Emphasis ours.) (R. 2.)

It is well established that "the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued". *The Osceola*, 189 U. S. 158 (1903), *Chelentis v. Luckenbach Steamship Company, Incorporated*, 247 U. S. 372 (1918); *Pacific Steamship Company v. Peterson*, 278 U. S. 130 (1928); and *Calmar Steamship Corp. v. Taylor*, 303 U. S. 525 (1938).

The Court-below erred both on authority and on reasoning in holding that the respondent was "in the service of the ship" after he had voluntarily left his vessel and was proceeding *on his own business* through the pier to which the vessel was moored and over which pier neither the petitioner nor its vessel had any ownership, control, or management.

The decision of the Court-below is in direct conflict with the case of *Aguilar v. Standard Oil Company of New Jersey*, 130 F. (2d) 154 (C. C. A. 2nd, 1942) in which case the identical question had already been determined and that decision has been approved by your Honorable Court as recently as November 16, 1942, by denial of plaintiff's petition for writ of certiorari. *Aguilar v. Standard Oil Company of New Jersey*, — U. S. —. In that case the plaintiff, whose ship was moored to a wharf, obtained leave

to go ashore to attend to personal business. About a half a mile away from the ship, the seaman, while returning to the vessel, was struck by a motor truck and injured. The Court held that the seaman was not in the service of his ship at the time of the accident and that he was therefore not entitled to maintenance and cure, stating that:

> "The outlines of the seaman's right to maintenance and cure have remained fairly constant from ancient times; until Congress sees fit to change its incidence, the court should enforce it as it is."

Any attempt to distinguish the *Aguilar* case from the instant case on the theory that the injuries in that case occurred about a half mile away from the ship, while in this case they occurred on the pier to which the ship was moored, is both illogical and unsound. Such a distinction is purely arbitrary and cannot form the basis of a sound judicial determination. Neither distance alone from the ship nor the fact that the accident occurred on a pier to which the ship was moored but over which neither the shipowner nor its vessel had any ownership, control, or management can be the determining factor. We can readily visualize piers covering many city blocks and extending over considerable territory.

The decision of the Court-below is also in apparent conflict with decisions of the Circuit Court of Appeals for the Ninth Circuit in which that court set forth the status of a seaman on shore leave (*Todahl v. Sudden & Christenson*, 5 F. (2d) 462 (C. C. A. 9th, 1925) and *Angco et al. v. Standard Oil Company of California*, 66 F. (2d) 929 (C. C. A. 9th, 1933)) and in which that court carefully discussed the test to determine whether or not a seaman was in the serv-

ice of his ship (*Meyer v. Dollar Steamship Line*, 49 F. (2d) 1002 (C. C. A. 9th, 1931)).

In *Todahl v. Sudden & Christenson, supra*, the seaman had been ashore on personal business and on his return was injured while crossing the wharf to which his vessel was moored. He sued the owners of his ship and the occupant of the wharf on two causes of action—one to recover under Section 33 of the Merchant Marine Act of June 5, 1920, 41 Stat. 1007, and the other to recover damages under the common law. The demurrer of the shipowners was sustained, and, on appeal, although the specific question of cure and maintenance was not discussed, the Court in affirming the judgment for the shipowners stated on page 464:

> ". . . here the plaintiff, in voluntarily going ashore, and thus by his own act making his return necessary, was not doing that which his contract of employment bound him to do. The owners of the steamship owed him the duty of providing a safe place in which to perform his work as a seaman. That duty did not extend to his protection when going beyond the premises of his employment for purposes of his own and over premises of which his employers had not dominion or control."

In *Angco et al. v. Standard Oil Company of California, supra*, the chief engineer, while on shore leave, was involved in an automobile accident while driving the shipowner's car. The Court, in denying recovery in an action against the company, described on page 930 the status of a seaman on shore leave, as follows:

> "When Warner left the ship at Kahului he was off duty, upon pleasure bound, and was beyond the scope of his employment. Unless some unforeseen emer-

gency arose he would not again come within the scope of his employment until he returned to the vessel. He was under no instructions to perform any service in any way connected with his employment; his sole responsibility, to return to his ship before she sailed, was a personal one."

In *Meyer v. Dollar Steamship Line, supra,* the seaman, who was not on watch, was injured while engaging in a friendly scuffle with a fellow seaman on board his vessel. The Court, in interpreting the phrase "in the service of the ship", considered its close analogy to the phrase "in line of duty" as applied to soldiers and sailors in the service of the United States and denied recovery for maintenance and cure on the ground that the seaman was not in the service of his ship.

The following decisions of district courts, whose decisions have not been appealed, have uniformly held that under circumstances similar to that involved herein a seaman is not entitled to maintenance and cure.

In *Collins v. Dollar S. S. Line, Inc., Limited,* 23 F. Supp. 395 (D. C. S. D. N. Y. 1938) the libellant, together with other members of the crew of his vessel, engaged in a game of baseball ashore while the vessel was lying in the Port of Singapore. The libellant was injured during the course of the game.

In *The President Coolidge,* 23 F. Supp. 575 (D. C. N. D. Wash. 1938) the libellant, while working as a seaman on his vessel, went ashore to the offices of the shipowners for the purpose of answering a long distance telephone call from his wife. Returning to the vessel, the seaman started to ascend a ladder which was made fast to the dock when he received certain injuries.

In *Smith v. American South African Line, Inc.*, 37 F. Supp. 262 (D. C. S. D. N. Y. 1941) the plaintiff, while at Beira, Africa, obtained leave to go ashore for purposes of his own. When about two miles away from the ship and in the course of returning to his vessel the seaman was struck by a motorcycle and injured.

In *Lilly v. United States Lines Co.*, 42 F. Supp. 214 (D. C. S. D. N. Y. 1941) the plaintiff had gone ashore to exchange a pair of gloves which he had previously purchased. He returned to his vessel early in the evening. The port at that time was blacked out because of wartime regulations, and the plaintiff, who was sober, in an effort to find the gangplank, fell from the dock into the water.

In *Wahlgren v. Standard Oil Company of New Jersey*, 1941 A. M. C. 1788 (D. C. S. D. N. Y.) the seaman had left his vessel on shore leave and was injured while riding in a truck about a quarter of a mile from the dock gate.

All five of the aforesaid district court cases were cited and approved by the United States Circuit Court of Appeals for the Second Circuit in its decision in *Aguilar v. Standard Oil Company, supra.*

We know of no decision extending the right of recovery by a seaman for maintenance and cure to the extent allowed in this proceeding. The decision, if not reversed, will represent an extreme departure from established principles governing recovery for maintenance and cure.

The limitation on the seaman's right to maintenance and cure has been succinctly expressed in Benedict on Admiralty Vol. 1 (6th Edition, 1940) on page 254: "Sickness or injury occasioned while off duty ashore or by the seaman's own wilful wrongdoing give him no rights against the vessel or her owners". The respondent's case falls clearly within the established exception.

The two cases which might be cited as indicating a contrary rule do not justify such a classification. The doubtful exception of *Hogan v. SS. J. M. Danziger*, 1938 A. M. C. 685 (D. C. E. D. N. Y. 1938), if in conflict, was overruled by the *Aguilar* case. The old case of *Reed v. Canfield*, 20 Fed. Cas. 426 (Case No. 11,641) (C. C. D. Mass. 1832), also cited by the Court-below but ably distinguished by the district court in its opinion, "clearly does not reach the facts in the present case". (R. 6.) In the *Reed* case, the seaman together with other members of the crew, pursuant to orders, had rowed the ship's mates from the vessel's anchorage to shore. The seaman was injured when he and his fellow seamen, after having spent several hours on shore with the permission of the ship's mates, were rowing the boat back to their ship. At the time of his injuries the seaman was actually engaged in carrying out orders issued to him by his mates and, therefore, in the service of his ship.

In the absence of circumstances showing that he was in fact within the call of duty and subject to orders, a seaman when away from his ship on shore leave cannot be said to be continuously in the service of his ship. This distinction was recognized by the district court when Judge Kirkpatrick stated in his opinion that ". . . the complaint in this case shows nothing but 'shore leave', and, as stated, implies nothing more than an obligation to return to the ship at some specified time". (R. 6.)

As stated by Judge Kirkpatrick in his opinion, "on shore leave he may go wherever he pleases, and if he goes where he cannot be reached he is to all practical intents and purposes exempt from any call to serve the ship until he returns; and whatever his general obligation, he is actually beyond the power and authority of the ship's officers". (R. 6.)

The United States Circuit Court of Appeals for the Third Circuit endeavored to justify its decision by distinguishing the *Meyer* case from the instant case and restricting the holding in the instant case to "the question of the seaman's rights with regard to injury suffered in the area immediately adjacent to his place of work through which he, of necessity, had to pass in going or coming" and left "open for decision when the case arises, what might be the legal liability if this plaintiff, having left the pier safely, had been hit by a truck on the public streets of Philadelphia", (*Smith v. American South African Line, Inc., supra*) or "if he sprained his ankle playing baseball on shore", (*Collins v. Dollar S. S. Lines, Inc., Limited, supra*).

We fail to see any distinction between an accident occurring on the premises adjacent to the seaman's vessel over which the vessel had no dominion and an accident occurring several miles away from his vessel when the seaman in each instance is on shore leave and on and about his own business. The proximity of the vessel to the place of the accident should not be the determining factor. Rather, the shipowner's liability is dependent solely on the question whether or not the seaman at the time of the accident was on his own personal business and pleasure or carrving out an order of the officers of the ship. In the former situation, clearly the seaman is not "in the service of the ship".

Cure and maintenance is recoverable for injuries sustained while a seaman is in the service of his ship, irrespective of fault or negligence, because the seaman is entitled, by the peculiar relationship which he has assumed, to such protection in the performance of services required

by the officers of the ship. The shipowner, having dominion and control over the vessel, is, and should be, in a position to see that proper protection at all times is available for the health and safety of the seaman who has entrusted his safekeeping to the officers of the ship. However, when a seaman leaves the ship on shore leave, the reason for the rule disappears, for the shipowner and the officers of the ship have no control whatever of the premises over which a seaman travels when ashore and are consequently unable to protect the seaman in any way. In this case the respondent was injured because the lights on the pier through which he was passing were extinguished and he was caused to fall into the open ditch because of the ensuing darkness. (R. 2.) The petitioner in this case had no more control over the lights on the pier and their subsequent extinguishment than the shipowner in the *Aguilar* case had over the operation of the motor truck which struck that seaman, and in both cases the shipowner had no control whatsoever over the actions of the seaman himself. It is immaterial whether the place where the seaman is injured happened to be adjacent to the vessel or located at a great distance away. In each instance, the officers of the ship have no control either of the instrumentality with which the seaman may come in contact, or of the actions of the seaman himself, and in each case the liability of the ship and the shipowner should be the same. However, in either case, the seaman is not without relief, for he may recover damages from a third party because of its negligence just as the respondent is now attempting to do by suit against the owner of the pier. *Jones v. Reading Co.*, 45 F. Supp. 566 (D. C. E. D. Pa. 1942).

The shipowner is not an insurer of the health and safety of a seaman at all times during the voyage. Main-

tenance and cure has been denied seamen when the injury was due to intoxication, *The SS. Berwindglen*, 88 F. (2d) 125 (C. C. A. 1st, 1937), and *Barlow v. Pan Atlantic S. S. Corporation*, 101 F. (2d) 697 (C. C. A. 2nd, 1939); when due to venereal diseases and gross acts of indiscretion, *The Alector*, 263 Fed. 1007 (D. C. E. D. Va. 1920); when due to a personal fight, *Lortie v. Amended Hawaiian Steamship Company*, 78 F. (2d) 819 (C. C. A. 9th, 1935); *Yukes v. Globe S. S. Corp.*, 107 F. (2d) 888 (C. C. A. 6th, 1939); and when due to wilful misconduct, *Oliver v. Calmar S. S. Co.*, 33 F. Supp. 356 (D. C. E. D. Pa. 1940). The only duty which the shipowner and his vessel owe to a seaman, so far as maintenance and cure is concerned, is similar to that afforded employees by workmen's compensation laws, namely, to provide a safe place for the seaman to perform his work wheresoever that work is to be done. Moreover if the respondent were seeking relief under The Pennsylvania Workmen's Compensation Act of June 21, 1939, P. L. 520 (77 P. S. §§1-1023), he would not be entitled to receive compensation. As humanitarian and liberal as is that act and similar state workmen's compensation laws, compensation is only payable to an employee who is injured beyond the premises of his employer if that employee is *actually* engaged in the furtherance of the business or affairs of his employer. *Maguire v. James Lees and Sons Co.*, 273 Pa. 85, 116 Atl. 679 (1922); *Palko v. Taylor-McCoy Coal & Coke Co.*, 289 Pa. 401, 137 Atl. 625 (1927).

We, therefore, submit that the decision of the Court below in holding that the respondent has stated a good cause of action for cure and maintenance is contrary to applicable decisions of your Honorable Court relating to a seaman's right to cure and maintenance and in direct con-

flict with the decisions of circuit courts of appeals and of the district courts hereinbefore set forth.

The petitioner's prayer for a writ of certiorari should therefore be granted.

Respectfully submitted,

JOSEPH W. HENDERSON,
GEORGE M. BRODHEAD, JR.,
Attorneys for Petitioner.

Philadelphia, Pa.
December 8, 1942.